THE HISTORICAL TREATMENT OF ARBITRATION UNDER ENGLISH LAW AND THE DEVELOPMENT OF THE POLICY FAVOURING ARBITRATION

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Abstract

The article examines the judicial attitude and the development of the policy of English law favouring arbitration. It suggests that, contrary to the prevailing narrative in legal literature, English judicial attitudes in the 18th and 19th centuries never reflected a hostility to arbitration. As is demonstrated, a policy favouring arbitration was introduced by the legislature as early as the end of the 17th century, and was subsequently developed by English courts deciding under statutory law and in the 19th century under the common law. The analysis offers, for the first time, an account of English arbitration as a dispute resolution system which originally emerged as being part of, rather than antagonistic to, the English courts system. Understanding how arbitration developed in England is important not only for historical purposes but also because it can provide helpful insights into current debates surrounding the legitimacy and potential reform of English arbitration law.

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1. INTRODUCTION

Today, it is generally accepted that English law and courts favour arbitration as a matter of policy.[1] However, the prevailing narrative in legal literature suggests that the pro-arbitration policy of English law only developed as recently as the second part of the 20th century.[2] Relying on a limited number of cases, mainly the rulings in *Vynior's* (1609), *Wellington v McIntosh* (1743) and *Kill v Hollister* (1746), and Lord Campbell's observation in *Scott v Avery* (1856) that English judges traditionally 'had great jealousy of arbitrations',[3] a number of commentators have argued that English courts in the 17th, 18th and 19th centuries were generally hostile to arbitration.[4]

It is claimed that the fact that arbitration was flourishing by the 15th century was mainly symptomatic of unfit common law institutions and a dysfunctional machinery of state justice at the time.[5] It is argued, therefore, that the rise of the

[1] See e.g. *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2013] EWCA Civ 1512 at [36(v)] (Gloster LJ, as she then was).

[2] See for example, Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014) 36–38; Julius Henry Cohen, *Commercial Arbitration and the Law* (D. Appleton 1918); K. Zweigert and H. Kotz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998); W.S. Holdsworth, *A History of English Law* (Volume 14) (Sweet & Maxwell 1937); Bruce L. Benson, 'An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States' (1995) 11(2) *Journal of Law, Economics, & Organization* 479–501.

[3] *Scott v Avery (1856) 5 H.L. Cas. 811, 10 ER 1121.*

[4] See for example, Ernest Lorenzen, 'Commercial Arbitration– International and Interstate Aspects' (1934) 43 Yale L.J. 721; Albert Van den Berg, *The New York Convention of 1958* (Kluwer 1981) 6; Julian Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) *Arbitration International* 183; Kyriaki Noussia, *Confidentiality in International Commercial Arbitration – A Comparative Analysis of the Position under English, US, German and French Law* (Springer 2010) 12.

[5] J.G. Bellamy, *Crime and Public Order in England in the Later Middle Ages* (London 1972) 114; R.L. Storey, *The End of the House of Lancaster* (Barrie and Rockliff 1966); and I. Rowney, 'Arbitration in Gentry Disputes of the Later Middle Ages' (1982) 67 *History* 367–76.

common law during the 17th and the 18th centuries entailed that common law courts felt empowered to curtail arbitrators' jurisdiction which was largely seen as a threat to their authority and a substitution of court litigation.

This article challenges the prevailing narrative on two grounds. First, it fails to distinguish between statutory arbitration and arbitration under the common law. As the article demonstrates, the policy of the law and attitudes of the courts were quite different under these two legal frameworks. Under statutory law, a policy favouring arbitration was introduced as early as the end of the 17th century and was further developed by a series of arbitration statutes in the 19th and 20th centuries. When deciding under statutory law, English courts were historically keen to enforce arbitration agreements and implement the policy favouring arbitration. By contrast, the common law did not develop a distinct policy favouring the enforcement of arbitration agreements until the second part of the 19th century.

Secondly, even under the common law, the suggestion that English courts were generally hostile to arbitration is exaggerated, if not inaccurate. Rather, the article suggests, the historical attitude of English courts towards arbitration can be more accurately described as one of cautious trust, informed by, on the one hand, common law's well-embedded respect for party autonomy and English courts' typical pragmatism, and, on the other hand, the idea that arbitration agreements cannot oust the jurisdiction of English courts and the entailing rule of revocability whereby arbitration agreements were revocable at will.

However, notwithstanding the fact that the rule of revocability remained good law throughout the 19th century, the attitude of English courts in the 18th and 19th centuries never reflected a broader ideological opposition to arbitration, as was the case in certain periods of time in other jurisdictions, for example in France, the US

and Germany. Rather, the article demonstrates, the principle of revocability mainly reflected a narrow doctrinal objection, namely that for English courts of the time arbitration agreements were akin to agency agreements which are in general inherently revocable, upon notice. Once the House of Lords ruling in *Scott v Avery*[6] offered a doctrinal way out, English courts had no difficulty to adopt a policy favouring the enforcement of arbitration agreements.

Overall, the analysis in this article offers for the first time an account of English arbitration as a dispute resolution system which organically emerged as part of, rather than antagonistic to, the English judicial system. As a result, arbitration in England was not historically perceived as a suspicious form of private justice which could potentially threaten the interests of the public, and challenge the authority of the courts and the common law.

As the article explains, understanding how arbitration developed in England and providing an accurate account of the development of the policy of the law favouring arbitration is important not only for historical purposes but also because it can provide helpful insights into current debates surrounding the legitimacy of arbitration, and the potential reform of English arbitration law under the Law Commission's 13th law reform programme. Because the pro-arbitration policy has been generally, albeit erroneously, understood to be a relatively recent development, arbitration has often been linked with the rise of capitalism and the re-emergence of transnational merchant law theories in the second part of the 20th century. In this context, arbitration has been criticised as being part of the project of neoliberalism to serve the interests of powerful corporations. While some of the accusations give rise to valid concerns for certain types of arbitrations, especially investment arbitration,

[6] *Scott v Avery* (n 3).

they are largely premised on wrong historical assumptions for commercial arbitration, at least in England. As the Law Commission in the UK is currently considering whether arbitration law may require reform, it is important for the legal community to embark on a balanced debate about English arbitration law, which is not based on inaccurate or partisan assumptions for the historical role of arbitration.

It should be noted from the outset that while the article relies on historical sources, mainly secondary, the main aim of the article is not to contribute to legal history debates; rather, it is to challenge pervasive misconceptions in arbitration scholarship about the historical evolution of arbitration in England and offer historical perspectives to advance the discussion about the current role of arbitration.

The article proceeds in six sections, including this introduction. To understand how the statutory policy favouring arbitration emerged and developed over the centuries in England, it is necessary to provide an overview of the historical context of arbitration practice within which the first arbitration statute was introduced at the end of the 17th century. Following this introduction, section two addresses this point and shows that most mercantile disputes in early modern England were decided by arbitration tribunals because arbitration offered a range of distinct advantages over litigation, especially for traders and merchants.

Section three reviews the arbitration statutes in the last three centuries and shows that the Parliament enacted a series of arbitration-related legislation with the aim of introducing a policy favouring arbitration as a means of promoting business. As a result, English courts, when deciding under statutory law, were on the whole keen to give effect to arbitration agreements.

Section four examines the attitude of English common law courts towards arbitration from early modern England until the 20th century, examining the

development of the principle of revocability. The analysis suggests that English common law did not develop a policy favouring arbitration until as late as the second part of the 19th century, and certainly much later than statutory arbitration. The analysis further suggests that while the principle of revocability remained part of the common law until the 19th century, the judicial attitude to arbitration was never fundamentally hostile. The fifth section provides a general assessment of the judicial and legislative treatment of arbitration in England and offers contrasting experiences from other jurisdictions, notably France, the US and Germany. Section six concludes the analysis by explaining the current importance of understanding how arbitration developed historically in England, and how challenging inaccurate assumptions concerning the policy favouring arbitration can add to the current debate for reform of English arbitration law in the context of the UK Commission's 13th programme of law reform.

2. ARBITRATION PREFERRED FOR DISPUTE RESOLUTION IN EARLY MODERN ENGLAND

Arbitration was already an established legal institution in early modern England making an important contribution to the social and economic development of the country. Mercantile disputes in particular were decided in their majority by arbitration tribunals, with commercial parties routinely agreeing, orally or in writing, to submit an existing dispute to arbitration under the common law prior to the filing of any action in court.[7]

[7] See Carli N. Conklin, 'A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America Symposium' (2016) *Journal of Dispute Resolution* 61 making the point in relation

The extensive use of arbitration in this era is demonstrated by a variety of historical records. First, standard forms of arbitration agreements and awards started to appear in the 17th century in certain lines of trade, notably in the field of construction and insurance.[8] Horwitz and Oldham state that almost all of the 90 surviving building agreements between 1720 and 1730 for the Grosvenor Estate in Mayfair required that any dispute between builders be submitted to three arbitrators, who were typically architects, surveyors and craftsmen.[9]

Further, there are numerous historical accounts of individuals working as busy arbitrators and mediators, commissioned both by the Government and by private parties, throughout the 16th and 17th centuries. For example, Roebuck states that Nathaniel Bacon, the older half-brother of the more famous Francis and a very popular arbitrator, was acting as arbitrator in two or three matters every month, on average.[10]

Finally, there is interesting contemporaneous legal literature on arbitration. Indeed, arbitration in the 17th century was considered important enough to attract the attention of extensive treatises such as John March's *Actions for Slander and Arbitrement* published in 1648, and an anonymous treatise, entitled *Arbitrium*

to English arbitration. Also Margo Todd, 'For Eschewing of Trouble and Exorbitant Expense: Arbitration in the Early Modern British Isles Symposium' (2016) *Journal of Dispute Resolution* 7.

[8] See for example, M. Clare, *Youth's Introduction to Trade and Business* (1751) 132–134, referring to forms of 'A Condition to attend the Award of Arbitrators' and 'The Form of Umpirage of Award'; cited in William Jones, 'An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States' (1958) 25(3) *University of Chicago Law Review* 447.

[9] Henry Horwitz and James Oldham, 'John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century' (1993) 36(1) *The Historical Journal* 145–146. Similarly, insurance policies, such as the Sun Fire proposals of 1727, provided that any dispute over loss or damage between insurer and insured would 'be submitted to the Judgment and Determination of Arbitrators indifferently chosen, whose Award [...] shall be conclusive and binding to all parties'. The prevalence of arbitration clauses in insurance policies was noted by Lord Campbell in *Scott v Avery* (n 3) at 853. Indeed, *Scott v Avery* was a case involving such an arbitration clause, and it was upheld by the court.

[10] See for more detail Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (HOLO 2017) drawing on a large collection of Bacon's published manuscripts, The Papers of Nathaniel Bacon of Stiffkey.

Revivum: Or the Law of Arbitration published in 1694.[11] In his treatise, March, a barrister in Grays Inn, noted that 'Arbitrements were never more in use than now', reassuringly adding that 'as long as Differences and Contentions arise among men, which will be to the World's End, certainly the learning of Arbitrements will deserve our Knowledge.'[12] Many other legal commentators of the time refer to arbitration as a distinct legal institution, including Blackstone who, in his *Commentaries on the Laws of England* (1765–1769), includes an extensive description of arbitration practices.[13]

There are several reasons that explain the preference of arbitration to common law courts. First, arbitration was favoured by merchants for being cheaper and quicker than litigation. The anonymous author of the 1694 treatise noted that 'Arbitrament is much esteemed and greatly favoured in our Common Law […] to prevent the great Trouble and frequent Expense of Law-suits'.[14] Importantly, parties usually dealt with the arbitration without legal counsel, who was required only for complex disputes referred to arbitration by equity courts.[15] Notably, arbitrators, at least before the 17th century, were not paid for their services, which were considered akin to public service. Indeed, the role of arbitrator was considered an honourable distinction for prominent men known for their sense of fairness and justice[16] (and

[11] James Oldham, 'The Historically Shifting Sands of Reasons to Arbitrate Symposium' (2016) *Journal of Dispute Resolution* 41, 42.

[12] See Oldham (n 11) 41.

[13] Blackstone's *Commentaries on the Laws of England* (Clarendon Press 1765) Vol. III, Chap. IV, 16–17: 'Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrongs, to the judgment of two or more arbitrators; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as umpire, (imperator) to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an award. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties of the judgment of the court of justice.'. Cited in Conklin (n 7) 61.

[14] See Preface, 'To the Reader' in *Arbitrium Redivivum: Or the Law of Arbitration* (1694), cited in Oldham (n 11) 42.

[15] Todd (n 7) 10.

[16] Craig Muldrew, 'The Culture of Reconciliation: Community and the Settlement of Economic Disputes in Early Modern England' (1996) 39 *The Historical Journal* 915, 932.

they were invariably men, as few historical examples of women acting as arbitrators exist).[17] Popular arbitrators only decided to make arbitration part of their business when the number of arbitration references significantly increased at the end of the 18th century,[18] and even then, they were charging modestly.[19]

As regards speed, in an observation that would probably embarrass many arbitrators today, arbitrators generally delivered their decisions on the same day the disputes were brought to them, with the longest hearings lasting no more than a few weeks.[20]

Secondly, arbitration had a broader jurisdictional scope than courts and was therefore more suitable for cross-regional and international disputes. Because of their consensual nature, arbitration tribunals could assume jurisdiction over disputes between merchants from different regions, including foreign merchants who were not subject to the jurisdiction of common law courts. As Blackstone noted:

> The reason of their original institution seems to have been, to do justice expeditiously among the variety of persons that resort from distant places to a fair or market; since it is probable that no inferior court might be able to serve its process, or execute its judgments, on both or perhaps either of the parties.[21]

[17] Francis Calvert Boorman, 'Arbitration and Elite Honour in Elizabethan England: A Case Study of Bess of Hardwick Symposium' (2016) *Journal of Dispute Resolution* 19, 20.
[18] Oldham (n 11) 43, referring to J. Palmer, *Supplement to the Attorney and Agents Table of Costs* (1833) 73.
[19] Oldham (n 11).
[20] Todd (n 7) 10. With reference to the court of *piepoudre*, Blackstone *Commentaries* (n 13) noted that 'the injury must be done, complained of, heard and determined, within the compass of one and the same day, unless the fair continues longer, Blackstone, *Commentaries* (n 13), 33.
[21] Blackstone, *Commentaries* (n 13).

Further, and more decisively, arbitration was trusted more than English courts because it operated as a *community-based* dispute settlement process.[22] Unresolved quarrels were perceived as a threat to the social structure of a community and could potentially lead men to abandon reason and resort to violence. Thus, there was a strong sense of duty within the community, underpinned by ethical Christian values, to assist their members to settle their disputes outside courts, preferably amicably.[23] Individuals who were frequently requested to act as arbitrators were prominent members of the local community, often including friends, neighbours and kinsmen, who had the advantage of knowing the disputing parties and often the history of the dispute.[24]

The concept of arbitration as a means to promote peace explains why arbitrators, from the early modern era onwards, were inclined not to declare a clear winner and leave a demoralised loser, but to arrive at a compromise which would be acceptable to all stakeholders in the dispute.[25] Honour was traditionally of great importance to dispute resolution in England.[26] A compromise would permit the losing party to save face and engage again with the winning party in a commercial relationship.[27] While today arbitrators are often criticised when they reach a compromise decision on the basis that 'splitting the baby' is essentially an attempt to appease both disputing parties who are paying their fees,[28] arriving at a decision that

[22] Todd (n 7) 8.
[23] Muldrew (n 16) 929.
[24] Todd (n 7) 8.
[25] Todd (n 7) 9.
[26] Francis Calvert Boorman, 'Arbitration and Elite Honour in Elizabethan England: A Case Study of Bess of Hardwick Symposium' (2016) *Journal of Dispute Resolution* 20, citing Linda A. Pollock, 'Honor, gender, and reconciliation in elite culture, 1570–1700' (2007) 46 J. Br. Stud. 3, 19.
[27] Derek Roebuck, 'The Myth of Judicial Jealousy' (1994) 10 *Arbitration International* 398.
[28] E.g. Alan Scott Rau, 'Integrity in Private Judging' (1997) 38 S. Tex. L. Rev. 488.

could bring about broad consensus was then generally considered a distinct advantage of arbitration and a manifestation of justice.[29]

Even further, merchants were not keen to have their disputes resolved by courts under common law, because the legal principles of the common law were generally alien to them and their practices. The identification of legal rules through doctrinal analysis and case law required skills possessed by lawyers, not merchants. By contrast, in the merchant courts and subsequently in arbitration, commercial disputes were resolved in accordance with the 'laws' and practices of the market which were readily familiar to merchants.

Importantly, not only were arbitrators applying the laws and practices of the market, but they were also willing to consider the broader context of disputes. Unlike courts which tended to focus on a single legal point of conflict, which might merely be symptomatic of a deeper conflict between the disputing merchants, arbitration allowed parties to ventilate all their grievances.[30] This broader approach to dispute resolution offered better prospects for arbitration to achieve an overall and lasting settlement of the dispute compared with court judgments.[31]

The observation that arbitration could traditionally achieve more than the law is further underscored by the fact that arbitrators often awarded remedies, including specific performance, that common law judges were unable to award.[32] In that sense, arbitration awards resembled decrees in equity. There are historical

[29] As Matthew Bacon stated in his 18th century encyclopaedia entitled *A New Abridgment of the Law*, first published in 1736, to be valid, an award had to be 'mutually satisfactory' which, according to him, meant the following: 'That which is awarded to be done to one must be an advantage to both, so as to end the controversy, and discharge one as well as give satisfaction to the other, for if it does not, it is manifestly unjust', Tit. *Arbitrament and Award*, sub-tit (E) "The Award Itself…", No. 3.

[30] see also Edward Powell, 'Settlement of Disputes by Arbitration in Fifteenth-Century England' (1984) Law and History Review 21, 55.

[31] Ibid, 56.

[32] Bruce Mann, 'The Formalisation of Informal Law: Arbitration before the American Revolution', (1984) 59 N.Y.U. L. Rev. 443, 465.

examples in the 17th century, where in a land dispute arbitrators ordered the return of the land to one party, fixed the rent for the use of the land and ordered the cancellation of all accounts between the parties.[33]

It becomes apparent from the preceding analysis that arbitration was widely practised in early modern England, and preferred by merchants for a range of commercial reasons.[34] This observation explains why the legislators by the end of the 17th century were keen to enact legislation to turn commercial practice into statutory policy, as is discussed in the next section.

3. THE 1698 ACT AND THE DEVELOPMENT OF THE STATUTORY POLICY FAVOURING ARBITRATION

Until late in the 17th century there were two main types of arbitration. First, parties would agree orally or in writing to submit an existing dispute to arbitration under the common law prior to the filing of any action in court.[35] This type of arbitration was called 'submission' under the common law.

Secondly, there were disputes that were referred to arbitration by English courts or other judicial authorities. Often when a party was bringing a mercantile dispute to common law courts and the Chancery by commencing a lawsuit, English courts would issue a rule referring the dispute to arbitration, on the basis that

[33] Mann (n 32).
[34] The preference of merchants for arbitration was nicely reflected by Daniel Defoe who in his 1727 treatise entitled *The Complete English Tradesman* stated that 'the honest peaceble tradesman will, as far as in him lies, prevent a decision at law' and prefer to submit disputes to 'a friendly accommodation by expostulation, by application, by arbitration': Daniel Defoe, *The Complete English Tradesman*, Vol. 2 (1727) 119, discussed in Todd (n 7) 18.
[35] See Conklin (n 7) 61.

arbitrators were better equipped to decide complex commercial disputes.[36] This type of arbitration was called 'reference'.

Despite the popularity of submissions, parties in this type of arbitration were often faced with two important challenges, namely to secure enforcement of the arbitration agreement (non-revocability) and compliance with the outcome of the final award (implementation).[37] To address these two problems, parties in arbitrations under the common law in early modern England typically entered into an arbitration bond which allowed a party to bring a lawsuit in the courts to secure compliance with an arbitration agreement in the event of revocation and to implement the outcome of the arbitration award in the event of non-compliance. These remedies, however, entailed that the aggrieved party had to sustain all the expenses and delays associated with litigation.[38]

By contrast, in references, the compliance of the parties with both the order of the courts to refer the dispute to arbitrators and the arbitrators' decision was secured through the courts' power to punish for contempt. Arbitrators would return their decision to the court, which had originally referred the dispute to them, as a Report which was filed as a court judgment. If a party failed to abide by it, it was held to be in contempt of the court.[39] Broad compliance with arbitration agreements and enforcement of arbitration awards as court judgments was a great advantage of references over submissions under the common law, and accordingly many parties would commence court proceedings with the aim of requesting the courts to refer the matter to arbitrators.

[36] Derek Roebuck, 'The English Inheritance—What the First American Colonists Knew of Mediation and Arbitration' (2016) *Journal of Dispute Resolution* 325, 329.
[37] Horwitz and Oldham (n 9) 141.
[38] Horwitz and Oldham (n 9) 141.
[39] See Conklin (n 7) 61.

However, it soon became apparent that disputing parties in references were wasting considerable time and expense in initially submitting their dispute to the courts so that it would subsequently be referred to arbitration.[40] Decisively, the parties could never be certain whether their dispute would indeed be referred to arbitration, as such a decision remained at the discretion of the courts.

Meanwhile, the enforcement of arbitration agreements and awards through bonds in submissions under the common law, which was already haphazard throughout the 16th and 17th centuries, was about to suffer a significant setback when the common law's treatment of penalty bonds changed at the end of the 17th century. Specifically, in 1697 the Parliament enacted the Administration of Justice Act which prohibited the recovery of penalties for any action on a bond issued for the purposes of guaranteeing the performance of an agreement.[41] Thus, if a party refused to abide by an arbitration agreement or award, the holder of an arbitration bond could only recover actual damages for non-performance, not penalties. Compared with penalties, damages for failure to abide by an arbitration agreement or award were difficult to prove and, by nature, very limited in amount.[42] This development had the potential of undermining the effectiveness of arbitration agreements and awards as well as the willingness of commercial parties to submit to arbitration under the common law.[43]

In response, the Parliament enacted the 1698 Arbitration Act, one of the first arbitration statutes in the world.[44] The 1698 Arbitration Act marked a significant moment of evolution for arbitration in England, because it introduced for the first time

[40] Conklin (n 7) 63.
[41] Administration of Justice Act 1697, 8 & 9 Will. III c. 11, in 8 British History Online http://www.britishhistory.ac.uk/lords-jrnl/vol16/pp114-116 [accessed 10 July 2018]).
[42] Penalties for arbitration bonds issued in the 17th century typically amounted to £100, which was a significant sum of money at the time.
[43] Conklin (n 7) 63.
[44] Conklin (n 7) 63; Born (n 2) 35.

a statutory framework for arbitration. The Act is often referred to as the Locke Act, because it was singlehandedly drafted by John Locke,[45] after the other four members of the Board commissioned him to 'draw up a scheme of some method of determining differences between merchants by referees, that might be decisive without appeal'.[46]

Locke, who was familiar with arbitration,[47] understood that merchants would be willing to use arbitration only if an effective legal mechanism was introduced to ensure that arbitration agreements and awards were complied with and enforced.[48] His draft was adopted by the Board, which submitted it to the Privy Council in January 1697, noting that statutory law was necessary to address the 'great obstruction in trade arising from the tedious determination of controversies between merchants and traders concerning matters of accompt or trade in our ordinary methods'. The Board urged the Council to adopt the draft on the grounds of the 'very great advantage to the Trade of this Kingdom'.[49] The bill was finally enacted with minor amendments in May 1698.[50]

The Locke Act expressly introduced a policy favouring arbitration by stating that a legal mechanism for the protection of arbitration agreements was necessary 'for promoting Trade and rendering the Awards of Arbitrators the more effectual in all Cases'.[51]Under the Locke Act, private parties who wished to refer their dispute to arbitration could register their agreement as a rule of court, but without

[45] Oldham (n 11) 42.
[46] Public Record Office, Colonial Office 391/9, p. 62, cited in Horwitz and Oldham (n 9) 138.
[47] Possibly because he was fully aware of disputes arising from the plantations in America of the time: see Barbara Arneil, 'Trade, Plantations and Property: John Locke and the Economic Defense of Colonialism' (1994) 55(4) *Journal of the History of Ideas* (October) 591–609.
[48] Horwitz and Oldham (n 9) 139.
[49] Cited in Horwitz and Oldham (n 9) 143.
[50] Horwitz and Oldham (n 9) 144.
[51] 'William III, 1697-8: An Act for determining Differences by Arbitration. Chapter XV, Rot.Parl. 9 Gul. III.p.3., in Statutes of the Realm: Volume 7, 1695-1701, ed. John Raithby (s.l, 1820), pp. 369-370. British History Online http://www.british-history.ac.uk/statutes-realm/vol7/pp369-370 [accessed 10 July 2018].

commencing court litigation. Once an arbitration agreement was registered with the court, it became 'subject to all the penalties of contemning a Rule of Court [as if] a suitor or defendant in such Court'.[52] Registration further entailed that the arbitrators' decision was returned to and issued by the courts, and was therefore enforced as a court judgment.[53] Thus, arbitration under the Locke Act offered the distinct benefits of both submissions and references, namely the ability to resort to arbitration without wasting time and expense in commencing litigation in the first place and the ability to enforce arbitration agreements and arbitral awards through the courts' contempt power.[54] As Horwitz and Oldham observe, the Locke Act 'did work', with most parties voluntarily abiding by arbitrators' decisions to avoid the punitive consequences from the courts' contempt power.[55]

As a result, the Locke Act lent significant impetus to statutory arbitration. For example, the number of cases conducted under the Locke Act increased tenfold between 1715 and 1785.[56] Matthew Bacon observed that submission of arbitration agreements as a rule of court became frequent after the 1698 Act,[57] while, some decades later, Blackstone stated that 'experience […] has shown the great use of arbitration' which was 'in consequence' of the 1698 Act.[58]

Despite the remarkable success of the Locke Act, a large number of arbitration agreements, namely agreements under the common law, were not protected against revocation. This was corrected later in the 19th century when the Common Law Procedure Act 1854 was enacted to extend the treatment of the breach

[52] Oldham (n 11) 42.
[53] Conklin (n 7) 63.
[54] Conklin (n 7) 63.
[55] Horwitz and Oldham (n 9) 155.
[56] Horwitz and Oldham (n 9) 147.
[57] Matthew Bacon, *The Compleat Arbitrator* (London, 1731) 33–34, as cited in Horwitz and Oldham (n 9) 145.
[58] Blackstone, *Commentaries*, (n 13).

of an arbitration agreement as a contempt of court to all arbitration agreements, regardless of whether the parties had agreed to register their agreement with the court.[59] This was a significant development that brought the majority of arbitration agreements into the protective scope of statutory arbitration. Importantly also, the 1854 Act set out, for the first time, statutory powers for the courts to refuse to hear a claim, which fell under an arbitration agreement, and refer the parties to arbitration.[60]

By the end of the 19th century, English arbitration law had made another significant advancement, with the enactment of the Arbitration Act 1889.[61] Crucially, the 1889 Act enshrined the rule of irrevocability for arbitration agreements and offered statutory protection to arbitration agreements for both existing and future disputes.[62] Further, the Act expressly provided that arbitration awards even from arbitrations that were not made a rule of court would be 'enforced in the same manner as a judgment or order to the same effect'.[63]

The Arbitration Act 1889 had an immediate impact on judicial attitudes towards arbitration. For example, in 1913 in *Bristol Corporation v John Aird*,[64] Lord Moulton observed that when English courts examine whether to enforce an arbitration agreement, they 'should start with an earnest desire to keep the parties to the domestic tribunal which was contemplated both in the contract and throughout the execution of the works', and noted that 'the Court must always remember that the parties themselves are estopped from saying that the tribunal in its constitution is unfair, because it is the one which they accepted as the basis of the contract'.[65]

[59] Common Law Procedure Act1854, s.XVII.
[60] Common Law Procedure Act 1854, s.XI.
[61] Born (n 2) 37.
[62] Arbitration Act 1889, s.1 and s.27.
[63] See for example, Arbitration Act 1889 s.2.
[64] *Bristol Corporation v John Aird* [1913] A.C. 241.
[65] *Bristol Corporation v John Aird* [1913] A.C. 241, 258.

Similarly, in the 1923 case of *Ayscough v Sheed Thomson*,[66] Scrutton LJ observed that if commercial parties have agreed to arbitration 'they should stand by their decision, and not try to upset it in the Courts'.[67] In the same year in *Kursell v Timber Operators*,[68] Salter J noted that 'in modern times Parliament has shown a constantly increasing desire to aid and encourage private arbitration', while three years later Scrutton LJ again observed in *Metropolitan Tunnel v London Electric Railway* that when parties have entered into an arbitration agreement 'it is eminently desirable' that they 'should keep it'.[69]

English statutory law in the 20th century continued to provide commercial parties and arbitrators with more powers in the conduct of arbitration proceedings. For example, the Arbitration Act 1950 accorded arbitrators the power to grant interim relief,[70] while the Arbitration Act 1979 accorded parties the significant power to take their arbitration disputes out of the purview of judicial review for errors of law.[71] Importantly, the Act abolished the power of the courts, which they had since the 1854 Act, to order arbitrators to refer ('state') a question of English law arising in the course of an arbitration or an award in the form of a special case for the decision of the High Court.[72]

The enhancement of the policy favouring arbitration marked by the Arbitration Act 1979 was soon taken up by the judiciary,[73] with Leggatt J observing in

[66] *Ayscough v Sheed Thomson* [1923] (28 Com. Cas. 203).
[67] *Ayscough v Sheed Thomson* [1923] (28 Com. Cas. 203), [208].
[68] *Kursell v Timber Operators Ltd* [1923] 2 K.B. 202.
[69] *Metropolitan Tunnel v London Electric Railway* [1926] Ch. 371, [388].
[70] Arbitration Act 1950, s.14.
[71] See Lord Hacking's entertaining account of the arbitration reforms implemented by the Arbitration Act 1979 in Lord Hacking, 'The Story of the Arbitration Act 1979' (2010) 76 *Arbitration* 125, 128.
[72] See for example, Arbitration Act 1950, s.21.
[73] Hacking (n 71) 125.

Arab African Energy v Olie Produkten,[74] that the 'public policy' in the relationship between English courts and arbitration was now underpinned by 'the need for finality' while 'the striving for legal accuracy may be said to have been overtaken by commercial expediency'. Remarkably, the House of Lords in the seminal case *The Nema*[75] exercised its power to not interfere with an arbitration out of 'a Parliament intention' that arbitration should not be controlled by English courts.[76] Specifically, while an appeal against an award was expressly permitted by the Arbitration Act 1979, the House of Lords held that in deciding whether to grant leave, the courts should take account of the parliamentary intention behind the Arbitration Act 1979 'to the turn of the tide in favour of finality in arbitral awards', rather than the wording of the Act.[77]

Finally, the Arbitration Act 1996 made it even harder for a party to challenge an arbitration award before English courts, under the strict test that a 'serious irregularity' has occurred in an arbitration, which has caused or will cause 'substantial injustice'.[78] Moreover, under the Arbitration Act 1996, parties have been accorded greater freedom to conduct their arbitration, and agree on the rules of evidence that should apply and the procedure that should be followed.[79] Meanwhile, the courts, as is expressly provided in the Arbitration Act 1996, have to refrain from intervening in an arbitration in England, except as is provided in the Act itself.[80]

[74] *Arab African Energy v Olie Produkten* [1983] 2 Lloyd's Rep. 419.
[75] *Pioneer Shipping Ltd v BTP Tioxide Ltd* (*The Nema)* [1982] A.C. 724; [1981] 3 W.L.R. 292; [1981] 2 All E.R.
[76] Hacking (n 71) 125.
[76] *Arab African Energy v Olie Produkten* [1983] 2 Lloyd's Rep. 419.
[77] *Pioneer Shipping Ltd v BTP Tioxide Ltd* (*The Nema*) [1982] A.C. 724, 739; [1981] 3 W.L.R. 292; [1981] 2 All E.R.
[78] Arbitration Act 1996, s.68.
[79] See for example, Arbitration Act 1996, ss.33–34.
[80] See Arbitration Act 1996, s.1.

The preceding analysis shows that in the last three centuries Parliament uninterruptedly enacted legislation that gave effect to a clear policy favouring arbitration as a means of promoting business, and that English courts deciding under statutory law were mainly keen to implement the pro-arbitration policy and give effect to arbitration agreements. These observations challenge the popular view that the pro-arbitration policy of English law developed as recently as the second part of the 20th century and that English courts until then were collectively hostile to arbitration. The next section turns its focus on how a pro-arbitration policy evolved under the common law.

4. JUDICIAL ATTITUDES TO ARBITRATION UNDER THE COMMON LAW

As discussed above, the Locke Act introduced, for the first time in England, a favourable statutory framework for the enforcement of arbitration agreements and awards. However, even after the introduction of the Locke Act most parties continued to submit their disputes to arbitration under the common law. While there is no data to show the number of submissions under the common law in the 18th century, as submissions were not registered with the courts and were thus mostly unrecorded, it is likely that submissions would have been the predominant form of arbitration at the time, as it was simpler and quicker for two businesspeople to agree to arbitrate than to register their agreement with the court or expressly provide that their agreement would be 'made a Rule of any of His Majesties Courts of Record' as the Locke Act required.

However, an arbitration agreement that was outside the protective scope of the Locke Act was revocable at will under the common law. Indeed, the legal principle that a private agreement 'could not oust' the jurisdiction of English courts was a common law rule throughout the 18th and 19th century.

The principle of revocability was first established in *Vynior's Case*, which was decided in 1609.[81] The case involved an action brought to the Court of Common Pleas by Robert Vynior against William Wilde on the basis that the latter failed to pay a bond of £20 which secured an arbitrator's decision on a dispute over 'divers kinds of parish business'.[82] Wilde claimed that he was not under the obligation to pay the bond, because he had withdrawn from the arbitration before the arbitrators rendered their decision. The Court in *Vynior's Case* reasoned that:

> [A]lthough [...] the defendant was bound in a bond to [...] observe arbitrament, yet he might countermand it; for a man cannot by his act make such authority [...] not countermandable, which is by the law and of its own nature countermandable.[83]

The *Vynior's Case* ruling was reiterated and further developed by *Wellington v McIntosh*[84] and *Kill v Hollister*,[85] which served as the main authorities for the rule that arbitration agreements were freely revocable under the common law in the 18th and mid-19th centuries. Specifically, in the 1743 *Wellington* decision, the parties had included an arbitration clause in their co-partnership agreement. When

[81] *Vynior's Case* (1609) 77 ER 597; 8 Co Rep 80a; also reported as *Vivion v Wilde* (1609) 2 Bro & Gold 290.
[82] Todd (n 7) 16.
[83] *Vynior's Case* (1609) 77 ER 597, [598]–[600]; 8 Coke Report 80a-81a.
[84] *Wellington v Mackintosh* (1743) 26 ER 741, (1743) 2 Atk. 569.
[85] *Kill v Hollister* (1746) 1 Wils. K.B. 129.

the plaintiff brought a bill in the court for discovery and relief against frauds, the defendant pleaded the arbitration agreement and that the matter between the parties should have first been submitted to arbitration. Hardwicke LC disallowed the plead on the basis that the plaintiff's bill was for discovery and relief 'against frauds, impositions, and concealments, for which the arbitrators could not examine the parties on oath'.[86]

A few years later, in the case of *Kill*, the plaintiff brought a lawsuit contending that, although the parties had included an arbitration clause in their insurance policy, he was entitled to commence litigation, because there was no arbitration pending. The King's Bench, in a decision whose reasoning was set out in just over two lines, upheld the plaintiff's claim holding that if a reference to arbitration was pending or if arbitrators had decided the dispute, a lawsuit might have been barred. However, the court held, because no reference was made, the lawsuit was 'well brought' before the court as 'the agreement of the parties cannot oust this Court'.

In subsequent years, English courts continued to hold, notably in *Mitchell v Harris* (1793) and *Street v Rigby* (1802), that an agreement to refer a dispute to arbitration 'has its binding force as an agreement only'. The courts further developed the *Kill* ruling, holding that the authority conferred by the parties on arbitrators is 'in its nature revocable' even after an arbitration has commenced, albeit before an award has been made.[87] The position of the English courts allowed parties to revoke arbitration agreements by self-executing a deed of revocation and effecting notice to the other party and the arbitrators a few days only before the arbitrators were about to render their award. In *King v Joseph*, for example, the plaintiff validly, according to

[86] *Wellington v Mackintosh* (1743) 26 ER 741, 2 Atk. 569, [570].

[87] See for example, *Mitchell v Harris* (1793) 2 Ves. Jr. 129, 30 ER 557; *Street v Rigby* (1802) 6 Ves. Jr. 815, 31 ER 1323; *Milne and Others, Assignees of Rhodes and Justamond, Bankrupts v Gratrix* (1806) 7 East 608, 103 ER 236; and *King v Joseph* (1814) 5 Taunton 452, 128 ER 765.

the decision, executed a deed of revocation of his submission on 21 September 1813 and gave notice of the revocation to the arbitrators and the defendant on 24 September 1813, with the arbitrators issuing their award on 25 September 1813.[88] Gibbs J held that, while the penalty from the arbitration bond cannot be revoked, the authority of the arbitrators could validly be revoked any time prior to the issuance of the award.

It was not until 1856 and the House of Lords decision in *Scott v Avery* that the attitude of English common law courts towards enforceability of arbitration agreements would change.[89] In *Scott*, an insurance policy on a ship provided that if a dispute arose "relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance," it would eventually be referred to arbitration and the decision of the arbitrators would be a condition precedent to the commencement of a lawsuit in court. When the plaintiff brought a lawsuit under the policy, the defendant pleaded, inter alia, that the dispute should have first been referred to arbitrators. While the Court of Exchequer gave judgement for the plaintiff, the judgement was eventually reversed by the House of Lords which held that the agreement of the parties that an arbitral award would be a condition precedence to a lawsuit was a valid condition, and the parties could not commence litigation before an arbitrator had issued a decision.

The House of Lords ruling in *Scott* marked a distinct advance in English arbitration law, by shifting the focus of legal inquiry from the question of whether parties could oust the jurisdiction of English courts to the question of whether there was any other (typically exceptional) circumstance, such as illegality or fraud, that

[88] *King v Joseph* (1814) 5 Taunton 452, 128 ER 765. Similarly, in *Brown v Tanner, the Younger* (1825) M'Cleland and Younge 464, 148 ER 495, where the plaintiff revoked his submission on 26 April 1824, and the arbitrators issued their award on 5 May 1824.

[89] *Scott v Avery* (1856) 5 H.L. Cas. 811, 10 ER 1121.

would prevent English courts from giving effect to the parties' agreement to arbitrate. As a result, the rule that arbitration agreements under the common law were revocable at will was effectively substituted by the emergence of a policy rule under common law that an agreement to arbitrate should in principle be given effect, barring exceptional circumstances.[90] In 1879 in *Collins v Locke*,[91] for example, the courts observed that 'since the case of *Scott v Avery* […] the contention that such a clause is bad as an attempt to the Court of jurisdiction may be passed by. The questions to be considered in the case of such clauses are whether an arbitration or award is necessary before a complete cause of action arises.'[92]

The same approach was adopted by English courts even when a claim was brought in equity. For example, in *Watford and Rickmansworth Railway Company v London and North Western Railway Company* (1869), Lord Romilly rejected the suggestion that parties could not by contract oust the court's jurisdiction of equity, stating that 'full effect must be given by a Court of Equity to any agreement for arbitration' and that a Court of Equity may, if it thinks fit, enforce an arbitration agreement 'by compulsory process'.[93]

It is clear from the preceding analysis that English common law did not develop a policy favouring the enforcement of arbitration agreements until the second part of the 19th century, and certainly much later than statutory law. However, this observation does not entail that common law courts in early modern England and

[90] *Ripley v Great Northern Railway* 3I L.T.R. (N.s.) 869 (Ch. 1875), per Jessel MR at 870.
[91] *Collins v Locke* (1879) 4 App. Cas. 674.
[92] *Collins v Locke* (1879) 4 App. Cas. 674, [689]. See also *Spackman v Plumstead Board of Works* (1885) 10 App. Cas. 229; *Scott v The Corporation of Liverpool Ct of Chancery* (1858) 1 Giffard 216, 44 ER 1297; *Viney v Bignold* (1888) L.R. 20 Q.B.D. 172; *Trainor v Phoenix Fire Assurance Co.*, 65 L.T.R. 825 (Ch. 1892); *Jackson v Barry Ry* (1893) 68 L.T.R. 472; *Spurrier v La Cloche*, [1902] A.C. 446 (Privy Council); *Gaw v British Law Fire Ins. Co*, [1908] I Ir.R. 245.
[93] *Watford and Rickmansworth Railway Company v London and Northwestern Railway Company* (1869) L.R. 8 Eq. 231, [239]; although see *Cooke v Cooke* (1867) L.R. 4 Eq. 77 (Sir W. Page Wood).

until the 20th century were collectively and as a matter of general approach antagonistic to arbitration as the prevailing narrative in literature suggests.[94] Claims for judicial hostility to arbitration are exaggerated, if not inaccurate, for the following reasons.

Arbitration at least until the 18th century was not conceived as an extra-judicial mode that was alternative to English courts. In fact, arbitration was often operating as part of the English judicial system. As was discussed above, English courts or other judicial authorities, including the Chancellor and the Council were habitually referring a great number of disputes, both mercantile and non-mercantile to arbitration throughout the early modern England.[95] The observation that English courts frequently made use of the commercial expertise of, and had confidence in, arbitrators underscores the fact that, in the eyes of the judiciary, arbitration was not perceived as an outsider or a potential competitor. Rather, arbitration traditionally was seen as an ancillary to the judiciary in England.[96]

It was only during the 18th and, in particular, the 19th centuries that arbitration started to evolve from being part of, and ancillary to, the English judicial system to being a distinct and alternative mode of dispute resolution. As was explained above, the catalyst for arbitration's development was the introduction of the Locke Act at the end of the 17th century and the expansion of the statutory protection to all arbitration agreements with the 1854 Common Law Procedure Act.

Did arbitration's transition to an autonomous system of dispute resolution affect the judicial attitude of English courts, possibly requiring them to view arbitration as a rival? It is unlikely that this was the case.

[94] See sources cited in notes 2 and 4 above; cf also Anonymous, 'The Growth of Arbitration' (1929) 67 *Law Journal* 247, 251.
[95] Todd (n 7) 8.
[96] See Roebuck (n 36) 340.

In the first place, the transition was the result of a gradual evolution over the course of three centuries (18th, 19th and 20th) rather than an abrupt split from the judiciary. The Locke Act introduced no radical measure that would separate arbitration from litigation, and did not abolish the courts' practice of referring cases to arbitration. While Mansfield, serving as a Chief Justice in the 18th century, had acquired a strong reputation as a skilled judge of complex commercial disputes, he was actively encouraging settlement of disputes by arbitration and was routinely referring cases to be decided by distinguished commercial lawyers of the time, such as James Burrow and Thomas Lowten.[97] Horwitz and Oldham state that over 300 suits appear in his trial notes as having been referred to arbitration in lieu of a jury verdict.[98] Overall, even after the introduction of the Locke Act, references from the courts, including the Common Pleas and particularly the King's Bench, continued to increase substantially in the course of the 18th century, from 48 in 1697 to 260 in 1805.[99] It was only after the introduction of the 1854 Act that references to arbitration started to decrease, not least because the majority of arbitration agreements were protected by statutory law, and therefore commercial parties had no reason to bring a lawsuit with the aim of having their dispute referred to arbitration.

In the second place, there are few examples of hostility in English courts to arbitration notwithstanding the common law rule of revocability of arbitration agreements. In this regard, the typical reliance on Lord Coke's 1609 decision in *Vynior's Case*[100] is mostly overstated, if not misplaced.

Relying on Lord Coke's dictum that the authority of arbitrators 'is by the law and of its own nature countermandable', some commentators have argued that

[97] Horwitz and Oldham (n 9) 148.
[98] Horwitz and Oldham (n 9) 148.
[99] Horwitz and Oldham (n 9) 148.
[100] *Vynior's Case* (1609) 77 ER 597; 8 Co Rep 80a.

English judges have traditionally been jealous of arbitration as a competing dispute resolution system, which they have historically sought to control and curtail.[101] However, other commentators suggest that the proposition that *Vynior's Case* demonstrates hostility towards arbitration is 'hardly tenable'.[102]

In the third place, much has been made of Lord Campbell's readings of the decisions in *Wellington* and *Kill* which, according to Lord Campbell, suggested that English courts treated arbitration agreements as unwarranted attempts to oust the courts of their jurisdiction.[103] Referring to *Wellington* and *Kill*, Lord Campbell noted in *Scott v Avery* that English judges 'had great jealously of arbitration' because 'the emoluments of the Judges depended mainly, or almost entirely, on fees, and as they had no fixed salaries there was great competition to get as much as possible of litigation into Westminster Hall and there was a great scramble in Westminster Hall for the division of the spoil.' [104]

However, Lord Campbell's account of English judicial attitudes towards arbitration has been described by commentators as an overstatement[105] or as unable to survive scrutiny.[106] Importantly, it has been observed that Campbell's readings of *Wellington* and *Kill* were based on defective printed reports, and that Hardwicke L.C. in *Wellington* had actually dismissed counsel's claim that the arbitration agreements between the parties should be construed as 'tending to oust the jurisdiction of the court'.[107]

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[101] See for example, Cohen (n 2) 95, 105, 128142; Zweigert and Kotz (n 2) 412; Holdsworth (n 2); Benson (n 2) 479–501, who talks about judicial hostility in the late 18th and early 19th centuries.
[102] Earl S. Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83(2) *University of Pennsylvania Law Review* 132, 139.
[103] Born (n 2) 37.
[104] *Scott v Avery* [1856] 5 H.L. Cas. 811, [853].
[105] Born (n 2) 37.
[106] Roebuck (n 36).
[107] See Horwitz and Oldham (n 9), 146.

The preceding analysis suggests that while the principle of revocability of arbitration agreements remained part of the common law until the 19th century, the judicial attitude to arbitration was never fundamentally hostile. The following section offers a general appraisal of the historical treatment of arbitration in England and offers contrasting experiences from other jurisdictions, notably France, the US and Germany.

5. AN ASSESSMENT OF THE HISTORICAL TREATMENT OF ARBITRATION IN ENGLAND

If claims for judicial hostility are mistaken, the historical attitude of English courts towards arbitration can be more accurately described as one of cautious trust, which was informed by two main groups of competing considerations. On the one hand, the well-embedded respect that English courts and the common law had for party autonomy, especially after the 18th century,[108] favoured arbitration. Valuing the idea that merchants should be presumed to know best how to organise their affairs, English courts have traditionally been keen to give effect to private dispute resolution arrangements by commercial parties. Lord Campbell must have echoed the views of many English judges when he stated in *Russell v Pellegrini* (1856) that[109] 'I never could imagine for what reason parties should not be permitted to bind themselves to settle their disputes in any manner on which they agreed.'[110] Further, English courts' typical pragmatism meant that they viewed arbitration as a potentially useful dispute resolution method that could alleviate the burden of their own heavy

[108] Alex Mills, *Party Autonomy in Private International Law* (CUP 2018), Chapter 2.
[109] *Russell v Pellegrini* (1856) 6 Ellis & Blackburn 1020.
[110] *Russell v Pellegrini* (1856) 6 Ellis & Blackburn 1020 [1025].

caseload. It is estimated, for example, that in early modern England an average of about 60,000 suits were brought every year before the central courts of King's Bench, Common Pleas, Chancery, Exchequer and Requests.[111] In addition, around 400,000 suits were brought annually in urban courts, and another 500,000 in the small rural courts throughout the country.[112] English courts in the 16th and 17th centuries, in particular, found it difficult to cope with the litigious culture of the time, and references to arbitration were seen as a helpful and welcome development.

On the other hand, English courts would still espouse the idea that arbitration agreements could not oust their jurisdiction. As a result, the rule of revocability remained good law throughout the 18th and the 19th century, largely undermining the binding force of arbitration agreements under common law. As was noted above, some commentators have observed that the rulings in *Wellington* and *Kill*, which together with *Vinyor's Case* were the foundations of the revocability rule, were largely misreported.[113] However, late 18th and early 19th century judges were perfectly aware of the fact that reports on these cases were defective; yet, they continued to endorse the rule of revocability. For example, having reviewed *Wellington*, the Lord Chancellor in *Mitchell v Harris*[114] observed that:

> There is no doubt that the reporter has mistaken Lord Hardwicke's reasons in the case. He has only taken down part of what was said and has

[111] Muldrew (n 16) 915.
[112] Muldrew (n 16) 915.
[113] See Horwitz and Oldham (n 9), 146.
[114] *Mitchell v Harris* (1793) 2 Ves. Jr. 129.

misapplied that; but still the case stands as a clear authority that the plea was overruled.[115]

If the late 18th and 19th century English courts were aware of the fact that the cases which served as the foundations of the revocability rule were defective, why did they continue to consider that arbitration agreements for future disputes were objectionable as 'ousting the jurisdiction of the court'?[116]

Some commentators play down the rule of revocability, suggesting that the Coke's dictum in *Vynior's Case* should be read in the historical context of the 17th century, when plaintiffs tended to submit to both arbitration tribunals and courts to commence the same proceedings against the same defendant, and they were subsequently revoking submissions when proceedings in one forum was developing against them.[117] In this regard, Todd argues that Coke's dictum most likely reflected the general practice and the law which at the time allowed plaintiffs to freely revoke submissions from a forum, rather than pronouncing a legal principle undermining the binding force of arbitration agreements.[118] However, Todd's suggestion does not reconcile with the clear ruling of numerous decisions in the 18th and 19th century which, as discussed, repeatedly upheld the rule that an arbitration agreement for future disputes *was not binding* as invalidly purporting to oust the jurisdiction of the courts of law.

Indeed, the revocability rule was not even reversed by the House of Lords ruling in *Scott v Avery* in mid-19th century as arbitration scholars often wrongly

[115] *Mitchell v Harris* (1793) 2 Ves. Jr. 129, [135]; *Halfhide v Fenning* (1788) 2 Bro. C. C. 336 (Kenyon MR).
[116] I am grateful to the anonymous reviewer who raised this question in an earlier draft of this article.
[117] Todd (n 17) 17.
[118] Todd (n 7) 17.

assume.[119] In fact, the House of Lords in *Scott* unanimously confirmed that under common law a private contract could not oust the jurisdiction of English courts. However, the court held that the revocability rule only prevented parties from waiving by contract their right of court action in respect of a future breach of contract.[120] By contrast, it was held, there was nothing in the common law to prevent parties from agreeing that *no breach of contract would occur* until the parties had first referred their dispute to arbitration, and an arbitration tribunal had issued its decision.[121] Parties could not freely revoke an agreement that an arbitration award was a condition precedent to the breach of contract, because such an agreement did not purport to generally oust the jurisdiction of English courts, which would not arise until a breach of contract had first occurred.

If defective reporting or the general practice allowing plaintiffs to bring the same claim before both courts and arbitration tribunals cannot explain the persisting appeal of the revocability rule in the 18th and the 19th century, it is suggested that this can be explained if due regard is given to the way English courts understood arbitration at the time. As is suggested in this article, for English courts arbitration was seen as a dispute resolution mode which was *ancillary* to, rather than *substitute of*, the courts of law or equity.[122] Therefore, for English courts an arbitration agreement for future disputes could never be valid as an agreement to substitute English courts by conferring judicial powers to a panel of arbitrators; rather, it could only be valid as an agreement to confer powers to arbitrators *as agents* for the two disputing parties to determine their liabilities to each other by award before the

[119] See for example, Born (n 2) 36–37.
[120] *Scott v Avery* (1856) 5 H.L. Cas. 811, 10 ER 1121, [847] (Lord Chancellor).
[121] *Scott v Avery* (1856) 5 H.L. Cas. 811, 10 ER 1121, [847]–[848] (Lord Chancellor) and [852] (Lord Campbell).
[122] Cf Mr Justice Cresswell, in *Scott v Avery*, (1856) 5 H.L. Cas. 811, 10 ER 1121, [840].

jurisdiction of the English courts arises.[123] However, like an agency agreement, an arbitration agreement was freely revocable upon notice. Indeed, several English decisions in the 19th century reflect the understanding of English courts that the arbitrators' function was essentially akin to that of an agent, and their powers were fiduciary, not judicial. For example, in *Cooper v Johnson*,[124] it was held that when a party to an arbitration dies after the hearing but before the award was made, the arbitrators have no authority to issue an award. The court reasoned that 'the death of either part is a revocation of the arbitrator's authority'. In *West London Extension v Fulham Union*,[125] it was held that the arbitrators have no power to award costs, unless they are expressly authorised by terms of reference. In *Hunter v Rice*,[126] it was held that the award of arbitrators in itself did not operate to change or establish title to property which the arbitrator had found that it had to be delivered by a tenant to his landlord upon a certain amount of money. Lord Ellenborough, C.J held that the award required the tenant's "ratification" and "assent", noting 'if indeed [the tenant] had accepted the money tendered, that would have been a ratification of the award, and an assent on his part to the transfer of the property; but without that, I cannot conceive that the property was transferred by the mere force of the award.'

It is because English courts understood arbitration agreements as agency contracts whereby arbitrators were accorded fiduciary, not judicial, powers, the above cases found that the arbitrator's authority was revoked with the death of a party, the arbitrators had no discretionary power to award costs and the award in itself could not operate to change or establish title to property.[127]

[123] I am grateful to the anonymous reviewer for this comment.
[124] (1819) 2 B. & Ald. 394, 106 ER.
[125](1870) L. R. 5 Q. B. 361.
[126] (1812) 15 East 100, 104 E.R. 782.
[127] T. Nathan, 'Two Views of Commercial Arbitration', Harvard Law Review

While jurisdictional theories treating arbitration as an essentially adjudicative process that substitutes the judicial function of national courts were developed in the early 20th century,[128] arbitration agreements in that period were seen from an exclusively contractual point of view, being unable to produce any jurisdictional effect. Naturally thus English courts of the time considered that the revocation of an arbitration agreement was not a valid bar to a lawsuit under the common law or equity.[129] The aggrieved party could only sue for damages for a breach of an arbitration agreement.[130]

Thus, the main objection of the English courts to the binding force of arbitration agreements was essentially doctrinal; it was not ideological or a matter of policy of the law. Once the House of Lords ruling in *Scot* offered a doctrinal way out of this objection, and arbitration agreements for future disputes were treated as a valid condition precedent to the jurisdiction of English courts, rather than as agreements purporting to oust their jurisdiction, English courts had no difficulty to adopt a policy favouring their enforcement. Lord Campbell characteristically noted:

> [W]hat pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract, that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract […] I can see not the slightest ill consequence that can flow from such an agreement, and I see great advantage that may arise from it. Public policy, therefore, seems to me to require that effect should be given to the contract.[131]

(1927), 40, 939.

[128] Mainly in the European continent, see for example, Balladore-Pallieri, 'L'arbitrage privé dans les rapports internationaux' *Recueil des Cours* (1935) 187, 51. For England see FA Mann, 'State Contracts and International Arbitration', *Brit. Y.B. Int'l L*. (1967) 42, 10-11.

[129] See *Brown v Tanner, the Younger* (1825) M'Cleland and Younge 464, 148 ER 495.

[130] *Mitchell v Harris* (1793) 2 Ves. Jr. 129.

[131] *Scott v Avery* (1856) 5 H.L. Cas. 811, 10 ER 1121, [853].

The judicial and legislative treatment of arbitration in England should be contrasted, for example, with the position of the judiciary and legislature in France, the US or in Germany, where attitudes in certain times in the 18th, 19th and 20th century reflected a fundamental, often ideological, opposition to arbitration which was largely seen as a private, and therefore suspicious, mode of dispute resolution lacking the necessary safeguards for the protection of the public interest. While the use of arbitration was widespread in the 16th and 17th century in France, after the French Revolution in 1789, arbitration was considered a threat to the rule of law and the authority of the revolutionary state,[132] with the 1806 Napoleonic Code of Civil Procedure imposing a number of important procedural restrictions on arbitration agreements and the arbitration process.[133] As one commentator has noted, 'all the provisions of the [Napoleonic Code] do appear to reflect a hatred of arbitration agreements and provide evidence of a secret desire to eliminate their existence'.[134] Importantly, hostility towards the idea of arbitration, which was treated as inferior, rather than an alternative, to national courts was largely shared by the French courts of the time.[135] The Cour de cassation, for example, in the 1843 decision in *Cie L'Alliance v Prunier* refused to give effect to an arbitration agreement, stating that '[o]ne does not find with an arbitrator the same qualities that it is assured to find with a magistrate:

[132] Born (n 2) 39; E.J. Cohn, 'Commercial Arbitration and the Rules of Law: A Comparative Study' (1941) 4 *University of Toronto Law Journal* 1, 1–32.

[133] See in particular Articles (1003) to (1028) of the Code of Civil Procedure (1806), which introduced an extremely unfavorable legal regime for arbitration. See further Born (n 2) 40; and Rene David, *Arbitration in International Trade* (Kluwer Law International 1985) 90.

[134] David (n 135**Error! Reference source not found.Error! Reference source not found.Error! Reference source not found.Error! Reference source not found.Error! Reference source not found.Error! Reference source not found.Error! Reference source not found.**) 90, quoting Bellot.

[135] J.-J. Clère, 'L'arbitrage révolutionnaire: apogée et déclin d'une institution (1790-1806)' (1981) Rev. Arb. 3.

the probity, the impartiality, the skillfulness, [and] the sensitivity of feelings necessary to render a decision'.[136]

A similar opposition to the main idea of arbitration was exhibited by the US courts and the legislator during the 18th and 19th centuries. Born has observed that 'significant judicial (and legislative) hostility to arbitration agreements' existed in the US,[137] which reflected a widespread perception that arbitration lacked important procedural safeguards and arbitrators were often unsuitable to ascertain and apply the law. The mistrust of arbitration and arbitrators was characteristically summarised by Joseph Story in the following terms:

> Now we all know that arbitrators at common law […] are not ordinarily well enough acquainted with the principles of law or equity to administer either effectually in complicated cases; and hence […] the judgment of arbitrators is but *rusticum judicium*. Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?[138] […] At all events courts of justice are presumed to be better capable of administering and enforcing the rights of the parties than any mere private arbitrators, as well from their superior knowledge as from their superior means of sifting the controversy to the very bottom.[139]

[136] Judgment of 10 July 1843, *Compagnie L'Alliance v Prunier*, 1843 Dalloz 561, (French Cour de cassation civ.), reprinted in (1992) Rev. arb. 399.
[137] Born (n 2) 45.
[138] *Tobey v County of Bristol*, 23 F. Cas. 1313, 1321–1322 (C.C.D. Mass. 1845).
[139] Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* (Volume 1) (13th edn, 1886), § 670.

Because of this ideological opposition to arbitration, arbitration agreements for future disputes were considered in the 19th and at the beginning of the 20th century as against US public policy,[140] and arbitrators' decisions were overturned by the US courts for procedural matters that were often minor and inconsequential.[141]

While legislative developments in the 20th century, notably the enactment of state legislation on arbitration[142] as well as the Federal Arbitration Act 1925, introduced a legal framework for the protection of arbitration agreements, a general mistrust of the propriety of arbitration pervaded the attitude of the US courts, including the US Supreme Court,[143] until as late as the second part of the 20th century. For example, the US Second Circuit in *American Safety Equipment Corp v J.P. Maguire & Co* (1968)[144] noted that as

> Issues of war and peace are too important to be vested in the generals [...] decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community – particularly those from a foreign community that has had no experience with or exposure to our law and values.

[140] Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, (Volume 2) (13th edn, 1886), §1457; *Parsons v Ambos*, 48 S.E. 696, 697 (Ga. 1904) holding that 'by first making the contract and then declaring who should construe it [NB: arbitrators], the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, immoral or contrary to public policy'.

[141] See Benson (n 2) 484; and the decisions of the United States Supreme Court in *Williams v Paschall*, 4 U.S. 284 (1803); and *Maybin v Coulon*, 4 U.S. 298 (1804).

[142] See for example New York legislation of 1920.

[143] See for example US Supreme Court decisions in *Bernhardt v Polygraphic Co*., 350 U.S. 198, 203, 76 S Ct 273, 276, 100 L.Ed. 199 (1956); *Wilko v Swan*, 346 U.S., at 435–437, 74 S Ct, at 186–188 (1953) and *Alexander v Gardner-Denver* 415 U.S. 36, 94 S Ct 1011, 39 L.Ed.2d 147 (1974).

[144] 391 F. 2d 821 (2d Cir. 1968).

Similarly, while historically commercial arbitration was commonly used by merchants in what is today Germany, German courts and commentary developed an acute mistrust for arbitration after the rise of the National Socialists in 1930s, systematically curtailing the use of arbitration as a matter of policy.[145] Cohn, writing in the 1940s, observed that 'to the totalitarian state, with its doctrine of the all-enslaving power of the state arbitration means an attempt of private individuals to free an important part of their activities from the dominating yoke of the governing group'.[146] Accordingly, no municipal authority was allowed to submit to arbitration while the policy of the exchange control authorities to whom every international arbitration agreement was submitted for approval before it became binding on a German party tended to eliminate arbitration as far as feasible.[147]

To a large extent, hostile attitudes to arbitration in these jurisdictions can be explained by exceptional historical and constitutional circumstances, particularly in early 19th century in France and in early 20th century in Germany, which had a profound effect on the role of the state and its relationship with private initiatives, including private modes of dispute resolution. By contrast, parliamentary sovereignty in England was largely established in the 18th century and, possibly as a result, English courts had fewer reasons to perceive arbitration as a challenge to the authority of the state law and courts. Indeed, the largely doctrinal objection of the English courts against arbitration agreements was very different than the broad concern that arbitration, as a private mode of dispute resolution, is inherently unfit and, thus, a potential threat to the public interest as suggested by the French, American and German experience. Traditionally, under English law very few restrictions of

[145] Born (n 2) 51.
[146] E. J. Cohn, 'Commercial Arbitration and the Rules of Law: a Comparative Study' *U. Toronto L.J.* (1941) 4(1), 28.
[147] Ibid.

arbitration existed on grounds of public interest or public policy. While English courts have held that 'what is a matter of public interest […] cannot be determined within the limitations of a private contractual process,'[148] what is considered a matter of public interest in the context of arbitration is narrow in scope.[149] None of the arbitration acts, from the Locke Act until the current 1996 Act, referenced in any form or guise the concept of public interest as a possible ground for prohibiting arbitration or challenging an award.[150] Traditionally, the concept of public policy, which was enshrined in some arbitration acts as a ground to refuse enforcement of an arbitration award, was narrowly construed and mainly limited to circumstances of illegality in the arbitration proceedings.[151] As was demonstrated above, the House of Lords from the mid-19th century in *Scott v Avery* stated that there was nothing contrary to English public policy in allowing parties to agree that a claim would not be submitted to English courts, at least until it had first been decided by arbitrators.[152]

6. CONCLUDING REMARKS: WHY AN ACCURATE ACCOUNT OF ENGLISH ARBITRATION'S HISTORICAL DEVELOPMENT MATTERS

Challenging the prevailing narrative about the traditional hostility of English courts and law to arbitration is important not only to correct the reductive historical account of how English arbitration developed in the last four centuries, but also to provide helpful insights into current debates surrounding the legitimacy of arbitration and potential reform of English arbitration law.

[148] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [40].
[149] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [98]–[99].
[150] Stavros Brekoulakis and Margaret Devaney, 'Public-Private Arbitration and the Public Interest under English Law' (2017) 80(1) *Modern Law Review* 22–56.
[151] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] EWCA Civ 1401; *Soleimany v Soleimany* [1998] 3 W.L.R. 811.
[152] *Scott v Avery* [1856] 5 H.L. Cas. 811 [853].

A wide range of scholars currently criticise arbitration as part of the project of neoliberalism to serve private interests and in particular the interests of powerful corporations.[153] For these commentators, arbitration entails the 'reassertion of merchant' authority and ultimately the substitution of state institutions, including the judiciary and law, by private forms of adjudication. It is thus argued that the legal policy favouring arbitration, which entails that arbitral awards are not generally reviewable by national courts on a question of law, *should be curtailed*, or altogether *abolished*, because it is 'part of a corporate strategy to further disembed commercial law and practice from the public sphere' and to enable private parties to operate in the shadow of the law.[154]

The main historical idea behind these views is that the policy favouring arbitration is a recent development of the late 20th century, coinciding with, and assisted by, the emergence of neoliberal accounts of commercial and corporate law. This idea is premised on the binary assumption that arbitration, as a form of private justice, can only thrive when the state system of civil justice is weak. It is claimed, for example, that arbitration in England first came to flourish in the 15th century when, and because, state law and the judiciary were dysfunctional.[155] However, it is argued, as the state and its legal institutions, including the common law in England, became more able and effective during the 17th and 18th centuries, the authority of arbitration was curtailed.[156] According to this account thus, it is only recently, when the rise of capitalism and the re-emergence of transnational merchant law theories challenged the authority of states to regulate their affairs at the end of the 20th century, that a

[153] See for example Amy Cohen, 'Dispute Systems Design, Neoliberalism, and The Problem of Scale', (2009) 14 Harv. Negot. L. Rev. 51, 55 and Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (CUP 2003).
[154] Cutler (n 155) 183.
[155] See the sources cited in n 5.
[156] Ibid.

policy favouring arbitration was developed to further erode the power of the state judiciary to control private interests.[157]

While some of these accusations give rise to valid concerns, especially for investment arbitration and public-private arbitration, i.e. arbitrations which implicate the public interest and which are, indeed, a development of the last century,[158] they are largely premised on wrong assumptions in relation to commercial arbitration. Indeed, linking arbitration with weak state legal institutions and the rise of capitalism in the 20th century is historically questionable, at least in England. The preference for arbitration was not the result of a sudden change in the policy of English law and courts that occurred at the beginning of the 20th century. As this article has demonstrated, a clear policy favouring arbitration has been embedded in statutory law from as early as the end of the 17th century, and was subsequently adopted by the common law in the 19th century. Importantly, the pro-arbitration policy in English law was not driven by the ideological forces of capitalism aiming to erode the powers and interests of the State. As has been explained, the policy favouring arbitration was implemented in the 17th century to accord statutory protection to a practice which was widely shared by traders and merchants for its distinct advantages over litigation.

Further, arbitration is not necessarily a historical symptom of weakened state authority and state institutions. Arbitration in England developed *in parallel with* the common law in the 18th and the 19th centuries. Crucially, arbitration did not historically emerge to challenge the state courts. As this article has shown, arbitration in England emerged as part of the courts system and was largely viewed as a trusted supplement, and ancillary, to the judicial machinery.

[157] Philip J. McConnaughay, 'The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration' (1999) 93 Nw. U. L. Rev. 453, 453.
[158] Brekoulakis and Devaney (n 152).

Given that the Law Commission in the UK has recently identified arbitration as one area which may require reform as part of the Commission's 13th programme of law reform,[159] it is important for the legal community to embark on a balanced debate about arbitration and English arbitration law, rather basing views on inaccurate or partisan assumptions concerning the historical role of arbitration in England. English arbitration law can and should be amended to protect the public interest in certain types of arbitrations more effectively, notably public-private arbitrations, as the author has discussed in detail elsewhere.[160] However, calls for an indiscriminate abolition of the policy favouring arbitration represent a split from a long tradition in English law and are premised on a crude and historically unsupported account of arbitration as a method of private justice which opposes state law and antagonises the judiciary.

[159] https://www.lawcom.gov.uk/arbitration/ [Accessed 9 July 2018].
[160] Brekoulakis and Devaney (n 152).